Supreme Court, U.S.
FILED
JUN 23 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1741

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. AND LUEA SORENSON,

Petitioners,

R. G. P. INCORPORATED, OTIS PETERSON, TRAVELERS INSURANCE COMPANY, STATE OF IOWA AND STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Respondents (Petitioners on separate petitions),

vs.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,

Respondents.

BRIEF OF PETITIONERS IN REPLY TO BRIEF OF THE OMAHA INDIAN TRIBE IN OPPOSITION TO PETITION FOR CERTIORARI

EDSON SMITH and
ROBERT J. BECKER
3535 Harney Street
Omaha, Nebraska 68131

THOMAS R. BURKE and
LYMAN L. LARSEN
1900 First National Center
Omaha, Nebraska 68102

Counsel for Petitioners, Roy Tibbals Wilson, Charles F. Lakin, Florence Lakin and Harold Jackson

MAURICE B. NIELAND
300 Toy National Bank Building
Sioux City, Iowa 51101

Counsel for Petitioners, Harold Sorenson, Harold M. Sorenson, Luea Sorenson and Darrell L. Sorenson

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

In The

Supreme Court of the United States

October Term, 1979

No. 79-1741

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. AND LUEA SORENSON,

Petitioners,

R. G. P. INCORPORATED, OTIS PETERSON, TRAVELERS INSURANCE COMPANY, STATE OF IOWA AND STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Respondents (Petitioners on separate petitions),

vs.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,

Respondents.

BRIEF OF PETITIONERS IN REPLY TO BRIEF OF THE OMAHA INDIAN TRIBE IN OPPOSITION TO PETITION FOR CERTIORARI

There is little in the brief of the Omaha Tribe which calls for a reply brief. But the Tribe's brief contains some statements which may be misleading and which we would like to correct or clarify.

I.

In the Tribe's brief (page 5), the 2900 acres herein involved is called the Blackbird Bend area. Heretofore in this litigation the 2900 acres has been referred to as the Barrett Survey area. It is bounded on the north,

east and south by the Barrett 1867 meander of the Nebraska shore, and on the west by the 1943 Iowa-Nebraska Compact Boundary Line. It is part of the larger area which has been called the Blackbird Bend area, and which is bounded on the north, east and south by the Iowa high bank, and on the west by the present Missouri River.

II.

On Pages 15, 45 and 46 of his brief, counsel for the Tribe refers to the order of "the trial court" of June 15, 1975, maintaining the Omaha Indian Tribe in possession of the Barrett Survey area, which it had seized by force of arms on April 1, 1975. This was an order by the Honorable Edward J. McManus, District Judge, entered after a fifteen minute hearing. Judge McManus relied on a representation by the Bureau of Indian Affairs in the form of a February 3, 1975 opinion of the Solicitor of the Department of Interior that the United States Engineers' Program in the 1940's for rechannelization of the river had the effect of cutting off the Blackbird Bend ox-bow from the Omaha Reservation in the 1940's so that it became part of the eastern bank of the Missouri River for the first time. Actually, the land in question had been on the Iowa side of the river long before the United States Engineers started their work in the area, which was in 1936. The Bureau of Indian Affairs was well aware of that from reports filed with that Bureau by its investigators, Clark and Robinson, in September of 1974, reflecting their investigations which they started in June of 1973. Nevertheless, counsel for the Tribe now seeks some support from the injunction of June 5, 1975.

Judge McManus's suggestion that the omission of the Barrett Survey area from the Monona County, Iowa, tax rolls may have indicated that the County Assessor may have been unsure as to whether the Tribe was owner, was adopted from that February 3, 1975 opinion of the Solicitor of the Department of Interior. However, at the trial, the delay in getting that land on the tax rolls of Monona County was explained by a May 7, 1958 resolution of the Monona County Board of Review (which supervises the County Assessor) "not to add any bar land along the Missouri River on the current tax books until the river is stabilized by the government engineers and proper survey is submitted to the Assessor's office by the proper officials." This applied to all accretion land in Monona County, not just to the Barrett Survey land (Ex. A3, R1801, 1802). The survey was eventually ordered and made, and the land assessed and taxed to the defendants or their predecessors in title.

With regard to the June 5, 1975 order of Judge McManus, see the brief of *Wilson, et al.*, in No. 78-160, pages 8 and 9. Judge McManus did not try the case. He handled preliminary matters. Judge Bogue tried the suit.

III.

At Page 38 of his brief, counsel for the Tribe takes exception to the statement in the *Wilson, et al.* Petition for Certiorari that:

> "The Court of Appeals concedes that there was no identifiable fast land (bank or island) or even *identifiable* riverbed (shore or sandbar) left in place as the thalweg in the Blackbird Bend moved west be-

> tween 1867 and 1879, or as it moved south from the north high bank between 1906 and 1923 or 1927."

That statement was made at the beginning of the Summary of the Argument on Page 12 of the Petition. We reaffirm that statement. It is supported by excerpts from the opinion of the Court of Appeals printed at Page 29 of said Petition for Certiorari. What the Court of Appeals is saying in effect is that a sandbar in a certain location after a high water period cannot be identified as the same sandbar that may have been located in the same area before it was submerged. So that Court's theory is: It can't be identified so it doesn't have to be identified. The Nebraska Supreme Court does not agree.

IV.

On Page 39 of his brief, counsel for the Tribe refers to the 1879 map as reflecting a survey made with the river at flood stage. The Court of Appeals said it was at flood stage, but the Court of Appeals was mistaken. The map (Appendix to Wilson's present Petition for Certiorari, Page 52, bears the surveyor's notation "stage —high water". That would mean ordinary high water, not flood stage. And ordinary high water in 1879 would be lower than in 1867 because the thalweg had been shortened by about three miles. That steepens the slope of the channel, increases the scour, deepens the channel and lowers the water level.[1] Such lowering of the water level would expose more bars and shore than would pre-

---

1 See *Lieneman v. Sarpy County*, 145 Neb. 382, 16 N. W. 2d 724, 730 (1944) quoting a U. S. Engineers report of January 28, 1880.

viously have been exposed with the same river flow. Lowering the ordinary high water mark increases the land area above it. This is called reliction and the same property rules apply as in the case of accretion.[2]

In the *Wilson* reply brief in No. 78-160 on Pages 17 to 20, there is a more extensive discussion of the 1879 map, to which we invite attention.

Respectfully submitted,

EDSON SMITH and
ROBERT J. BECKER
3535 Harney Street
Omaha, Nebraska 68131

THOMAS R. BURKE and
LYMAN L. LARSEN
1900 First National Center
Omaha, Nebraska 68102

Counsel for Petitioners, Roy Tibbals Wilson, Charles F. Lakin, Florence Lakin and Harold Jackson

MAURICE B. NIELAND
300 Toy National Bank Building
Sioux City, Iowa 51101

Counsel for Petitioners, Harold Sorenson, Harold M. Sorenson, Luea Sorenson and Darrell L. Sorenson

---

2 See *Burket v. Krimlofski*, 167 Neb. 45, 91 N. W. 2d 57, 60, 61 (1958).